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Fair Use in The Netherlands – a Renaissance?

Tijdens de implementatie van de Auteursrechttrichtlijn heeft de Nederlandse wetgever de voorkeur gegeven aan het handhaven van een gesloten systeem van nauwkeurig in de wet omschreven beperkingen van het auteursrecht.¹ In vergelijking met open, op abstracte factoren rustende systemen, zoals de fair-use doctrine in de VS, vermindert deze beslissing aan de ene kant de flexibiliteit op het terrein van beperkingen. Aan de andere kant lijkt het weliswaar aannemelijk dat zo'n gesloten systeem meer rechtszekerheid biedt en daardoor het nadeel van trage wettelijke reacties op snelle technologische veranderingen compenseert. Met een beroep op de Europese driestappentoets waarmee Nederlandse rechters de gedetailleerde nationale regelingen inzake beperkingen wegwuiven, is het beweerde voordeel van vergrote rechtszekerheid echter niet langer realiseerbaar. De Nederlandse infrastructuur op het gebied van auteursrechtelijke beperkingen verkeert derhalve in een deplorabele staat. Het systeem biedt noch voldoende flexibiliteit noch genoeg rechtszekerheid. De tijd is dus rijp om de optie van een fair-use bepaling die ten minste voor meer flexibiliteit zou zorgen in heroverweging te nemen.

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In the course of implementing the EC Copyright Directive, the Dutch legislator decided to maintain a closed system of carefully-defined copyright limitations.¹ This decision, on the one hand, reduces flexibility in the field of limitations when compared with open systems resting on a set of abstract factors, such as the US fair-use doctrine. On the other hand, it may be expected to outweigh the disadvantage of slow legislative reactions to rapid technological change by enhancing legal certainty. With Dutch courts invoking the EC three-step test to supersede the detailed domestic rules governing limitations, however, the alleged advantage of enhanced legal certainty can no longer be realised. In consequence, the Dutch limitation infrastructure is in a lamentable state. It provides neither sufficient flexibility nor sufficient legal certainty. Hence, the time is ripe to reconsider the option of introducing a fair-use clause that would offer at least more flexibility.

Flexibility and legal certainty

International lawmaking and harmonisation activities have led to a remarkable approximation of Anglo-American copyright and continental-European *droit d'auteur*. To this day, however, the approach to copyright limitations differs significantly: Whereas continental-European countries provide for a closed catalogue of carefully-defined limitations, the Anglo-American copyright tradition allows for an open-ended fair-use system that leaves the task of identifying individual cases of exempted unauthorised use to the courts. A prominent example of the latter approach is

the fair-use doctrine that has evolved in the United States. Section 107 of the US Copyright Act permits the unauthorised use of copyrighted material for purposes 'such as criticism, comment, news reporting, teaching [...], scholarship, or research.'² To guide the decision on individual forms of use, four factors are set forth in the provision which shall be taken into account among other considerations that may be relevant in a given case:

- (1) *the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*

¹ See chapter I, § 6 of the Dutch Copyright Act (Auteurswet).

² See Sec. 107 of the US Copyright Act. The list is understood as an open, non-exclusive enumeration. See Senate and House Committee Reports, as quoted by L.E. Seltzer, *Exemptions and Fair Use in Copyright – The Exclusive Rights Tensions in the 1976 Copyright Act*, Cambridge (Massachusetts)/London: Harvard University Press 1978, p. 19-20: '[...] since the doctrine is an equitable rule of reason, no

generally applicable definition is possible, and each case raising the question must be decided on its own facts... The bill endorses the purpose and general scope of the judicial doctrine of fair use [...] but there is no disposition to freeze the doctrine in the statute [...]. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.'

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.³

On the basis of this legislative framework and established case law, US courts conduct a case-by-case analysis in order to determine whether a given use can be exempted from the control of the copyright holder.⁴ The foremost advantage of this open-ended system can be seen in sufficient flexibility for safeguarding copyright's delicate balance between exclusive rights and limitations satisfying social, cultural and economic needs. Within the flexible fair-use framework, the courts can broaden and restrict the scope of limitations. In this way, they are capable of adapting the copyright limitation infrastructure to new circumstances and challenges, such as the digital environment. Leaving this discretion to the courts reduces the need for constant amendments to legislation that may have difficulty in keeping pace with the speed of technological development.⁵

The advantage of flexibility, so runs the counter-argument of opponents of fair use, implies the risk of legal uncertainty.⁶ The validity of this argument appears doubtful in the light of established case law that testifies to a long US tradition of identifying fair-use limitations case-by-case. The assertion of insufficient legal certainty, however, offers advocates of restrictively-delineated limitations the opportunity to present traditional continental-European systems as shining examples of legal certainty. In this line of reasoning, the detailed definition of limitations in continental-European copyright legislation clearly indicates the scope of permitted unauthorised use, and makes court decisions foreseeable – even in the digital environment.

Worst-case scenario

Current EC legislation on copyright limitations can be characterised as a halfway house combining elements of both traditions.⁷ On the one hand, Art. 5 of the Copyright Directive 2001/29 recalls the continental-European tradition by providing for a closed catalogue of limitations. On the other hand, the enumerated limitations are subject to the three-step test that has become part of the *acquis communautaire*. A line between the system of abstract criteria established by the test – certain special cases, no conflict with a normal exploitation, no unreasonable prejudice to legitimate interests – and open-ended provisions, such as the US fair-use doctrine, can easily be drawn.⁸ The drafting history of the three-step test, moreover, confirms that the flexible formula has its roots in the Anglo-American copyright tradition.⁹

The corrosive effect of this hybrid EC concept on traditional continental-European systems with carefully-defined limitations can currently be observed in the Netherlands. Dutch courts applied the three-step test already prior to the Copyright Directive.¹⁰ On the one hand, the adoption and implementation of the Directive led to more frequent references to the three-step test that are made to confirm and strengthen findings equally following from domestic rules.¹¹ This way of applying the three-step test has little impact on the Dutch catalogue of limitations. On the other hand, however, the Directive inspired a line of decisions that use the three-step test to override the closed Dutch system of statutory limitations.

In a ruling of March 2, 2005, the District Court of The Hague forced the long-standing exception for press reviews onto the sidelines, and invoked the three-step test of the

3 See Sec. 107 of the US Copyright Act.

4 The factors provide guidance for the application of the 'equitable rule of reason' which fair use represents. Cf. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), section IV.B. Additional factors may be taken into account. As to the application of the fair-use doctrine in practice, see P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105 (1125-1130); J. Litman, 'Reforming Information Law in Copyright's Image', *University of Dayton Law Review* 22 (1997), p. 588 (612); D. Nimmer, "'Fairness of Them All' and Other Fairy Tales of Fair Use", in: J. Boyle (ed.), 'Law and Contemporary Problems', *Duke University Law Journal* 66 (2003), p. 263.

5 See M.R.F. Senftleben, 'Bepalingen à la carte: Waarom de Auteursrechtlijn ruimte laat voor fair use', *AMI* 2003, p. 10; Chr.A. Alberdingk Thijm, 'Fair use: het auteursrechtelijk evenwicht hersteld', *AMI* 1998, p. 145, en 'Fair use – In weiter Ferne, so nah', *AMI* 1998, p. 176.

6 See H. Cohen Jehoram, 'Fair use – die ferne Geliebte', *AMI* 1998, p. 174, 'Implementatie van de Auteursrechtlijn – De stille strijd tegen een spookrijder', *NJB* 2002, p. 1690, 'Nu de gevolgen van trouw en ontrouw aan de Auteursrechtlijn voor fair use, tijdelijke reproductie en driestappentoets', *AMI* 2005, p. 153, 'Wie is bang voor de driestappentoets in de Auteursrechtlijn?', in: N.A.N.M. van Eijk & P.B. Hugenholtz (eds.), *Dommering-bundel*, Amsterdam: Otto Cramwinckel Uitgever 2008, p. 57.

7 See M.R.F. Senftleben, *Copyright, Limitations and the Three-Step Test – an Analysis of the Three-Step Test in International and EC Copyright Law*, The Hague/London/New York: Kluwer Law International 2004, p. 278-281.

8 In particular, the prohibition of a conflict with a normal exploitation in the three-step test recalls fourth fair-use factor 'effect of the use upon the poten-

tial market for or value of the copyrighted work'. Cf. K.J. Koelman, 'Fixing the Three-Step Test', *EIPR* 2006, p. 407.

9 See observation by the United Kingdom, Doc. S/13, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 630. Cf. Senftleben, supra note 7, p. 47-52.

10 In the case *Zienderogen Kunst*, dating back to the year 1990, the Dutch Supreme Court invoked the three-step test of Art. 9(2) of the Berne Convention to support its holding that the quotation of a work may not substantially prejudice the right holder's interest in the exploitation of the work concerned. See Hoge Raad, June 22, 1990, no. 13933, *NJ* 1991, p. 268 with case comment by J.H. Spoor; *Informatierecht/AMI* 1990, p. 202 with case comment by E.J. Dommering; *AA* 40 (1991), p. 672 with case comment by H. Cohen Jehoram.

11 In 2003, the Amsterdam Court of Appeals found that a parody did not harm the normal exploitation of the parodied work because it concerned a different market. See *Gerechtshof Amsterdam*, January 30, 2003, *AMI* 2003, p. 94 with case comment by K.J. Koelman. In a 2006 decision concerning online advertisements reproducing the so-called 'TRIPP TRAPP chair', the Court of Zwolle-Lelystad referred to the three-step test of Art. 5(5) of the Directive in the context of Art. 23 of the Dutch Copyright Act – a limitation permitting the use of certain artistic works for the purpose of advertising their public exhibition or sale. The Court found that the use in question prejudiced the exploitation interest of the right holder. This was one of the reasons for denying compliance with Art. 23. See *Rechtbank Zwolle-Lelystad*, May 3, 2006, case no. 106031, *IJN* AW6288, *AMI* 2006, p. 179 with case comment by K.J. Koelman; *Mediaforum* 2006/9 with case comment by B.T. Beuving.

Copyright Directive instead.¹² The case concerned the unauthorised scanning and reproduction of press articles for internal electronic communication (via e-mail, intranet etc.) in ministries – a practice that also offered certain search and archive functions. Seeking to determine whether this practice was permissible, the Court refused to consider several questions raised by the parties with regard to the specific rules laid down in Art. 15 of the Dutch Copyright Act and Art. 5(3)(c) of the Copyright Directive. In the Court's view, consideration of these specific rules was unnecessary because the contested use did not meet the requirements of the EC three-step test anyway:

The reason for leaving these three questions unanswered is that the digital press review practice of the State, in the opinion of the court, does not comply with the so-called three-step test of Art. 5(5) of the Copyright Directive.¹³

The subsequent discussion of non-compliance with the three-step test resembles a US fair-use analysis rather than a close inspection of a continental-European statutory limitation. In particular, the Court stresses the growing importance of digital newspaper exploitation and the impact of digital press reviews on this promising market. The ministry press reviews are held to 'endanger' a normal exploitation of press articles and unreasonably prejudice the publisher's legitimate interest in digital commercialisation.¹⁴ Under the fourth US fair-use factor 'effect of the use upon the potential market for or value of the copyrighted work', similar considerations could play a decisive role.¹⁵

The focus on the three-step test, constituting the basis of the Court's reasoning in the press review case, inevitably marginalizes the detailed rules established in Dutch law. On its merits, the applicable statutory limitation laid down in Art. 15 of the Dutch Copyright Act, merely opens the door to the three-step test. As a result, it is rendered incapable of influencing the further test procedure.¹⁶

In a more recent decision of June 25, 2008, the District Court of The Hague, again, invoked the three-step test. In a case concerning the payment of equitable remuneration for private copying activities, the Court devoted attention to the question of use of an illegal source as a basis for pri-

vate copying.¹⁷ The detailed regulation of private copying in Art. 16c of the Dutch Copyright Act does not contain any indication to the effect that private copying from an illegal source is to be deemed impermissible. The drafting history of the provision, by contrast, reflects the clear intention of the Dutch legislator to exempt private copying irrespective of whether a legal or illegal source is used.¹⁸ Having recourse to the three-step test of Art. 5(5) of the Copyright Directive, the District Court of The Hague, nonetheless, dismantles this seemingly robust edifice of legal certainty in one single sentence. Without offering a detailed analysis, the Court stated that private copying from an illegal source was 'in conflict with the three-step test'. Accordingly, it was held to fall outside the private copying exemption of Art. 16c:

In the parliamentary history, there are indications of a different interpretation. However, the interpretation advocated by the minister and supported by the government – assuming that private copying from an illegal source was legal – is in conflict with the three-step test of Art. 5(5) of the Directive.¹⁹

The central point here is not the prohibition of private copying using illegal sources. It is the erosion of the major argument advanced in favour of carefully-defined continental-European limitations and against the Anglo-American fair-use system. Regardless of detailed definitions given in the Dutch Copyright Act, the ruling of the Court minimises the degree of legal certainty in the field of copyright limitations. Users of copyrighted material in the Netherlands can no longer rely on the wording of relevant statutory limitations. On the basis of the EC three-step test, a certain use may be held to amount to copyright infringement even though it is exempted from the authorisation of the right holder in the Dutch Copyright Act.²⁰

The Court's way of applying the three-step test enhances legal uncertainty. In general, a court invoking the EC three-step test ought to be alert to the risk of legal uncertainty which this departure from the wording of national provisions implies. Hence, national courts can be expected to offer a detailed explanation of the requirements resulting from the test's abstract criteria to make future decisions and further adaptations of national limitations foresee-

12 See Rechtbank Den Haag, March 2, 2005, case no. 192880, *IJN* AS 8778, *Computerrecht* 2005, p. 143 with case comment by K.J. Koelman.

13 See Rechtbank Den Haag, *ibid.*, para. 14: 'De reden voor het thans onbeantwoord laten van deze drie vragen is dat de digitale knipselkrantenpraktijk van de Staat naar het oordeel van de rechtbank de zogenoemde drie-stappen-toets van art. 5 lid 5 Auteursrechtlijn niet kan doorstaan.'

14 See Rechtbank Den Haag, *ibid.*, para. 16-18.

15 See the decision of the US Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 US 417 (1984), section IV.B: 'actual harm need not be shown [...]. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.'

16 See M.R.F. Senftleben, 'L'application du triple test: vers un système de fair use européen?', *Propriétés intellectuelles* 2007, p. 453.

17 See Rechtbank Den Haag, June 25, 2008, case no. 246698, *IJN* BD5690, *AMI* 2008, p. 146 with case comment by C.B. van der Net.

18 See the material quoted by the Rechtbank Den Haag, *ibid.*, para. 4.4.1.

19 See Rechtbank Den Haag, June 25, 2008, case no. 246698, *IJN* BD5690, para. 4.4.3: 'In de parlementaire geschiedenis zijn weliswaar aanknopingspunten te vinden voor een andere uitleg, maar de door de minister voorgestane en door de regering onderschreven uitleg, waarbij ervan wordt uitgegaan dat een privé-kopie van een illegale bron legaal is, is in strijd met de drie-stappen-toets van artikel 5 lid 5 van de Richtlijn.' The decision has been published in *AMI* 2008, p. 146 with case comment by C.B. van der Net.

20 Cf. M.R.F. Senftleben, 'Privé-kopiëren in het licht van de driestappentoets – opmerkingen naar aanleiding van het vonnis van de Haagse rechtbank inzake de thuiskopie', *IJR* 2008, p. 265.

able.²¹ The simple formula of 'conflict with the three-step test' used by the District Court of The Hague hardly meets this basic requirement of applying flexible, open norms.

In sum, the current situation in the Netherlands can be qualified as a worst-case scenario. On the one hand, copyright limitations are straitjacketed. Invoking the EC three-step test, Dutch courts seem likely to further restrict statutory limitations that are embedded in a detailed legislative framework anyway. On the basis of this approach, it is impossible to realise the central advantage of flexibility that is inherent in open norms with abstract criteria, such as the three-step test. On the other hand, the purported advantage of legal certainty that justifies the system of carefully-defined limitations, is also beyond reach. As the EC three-step test is invoked by the courts to override detailed national provisions, users of copyrighted material cannot rely on the wording of Dutch limitations. The validity of detailed rules set forth in the Dutch Copyright Act is hanging by the thread of compliance with the abstract criteria of the EC three-step test. In a nutshell, the current Dutch system of copyright limitations provides neither sufficient flexibility for copyright limitations nor sufficient legal certainty for users of copyrighted material. It combines the two disadvantages of the Anglo-American and the continental-European approach.

Remaining option

With the Copyright Directive subjecting the application of copyright limitations to the three-step test, it is no longer feasible to attain the degree of legal certainty that may be reached in a traditional continental-European system with a closed catalogue of carefully-defined limitations and no additional, abstract control mechanism. The EC three-step test can be repeated at the national level to clarify that unauthorised use of copyrighted material must not only comply with the specific requirements of national copyright limitations but also with the general criteria of the test.²² This clarification would reflect the approach currently taken by Dutch courts. However, it enhances rather than reduces the influence of the test's open-ended criteria

on detailed Dutch provisions, and paves the way for further inroads into the traditional system of carefully-defined limitations. More legal certainty than that provided by Anglo-American fair-use systems can hardly be achieved in this hybrid framework. The open criteria of the three-step test are just as unpredictable as US-American fair-use factors. With regard to the dilemma of combined inflexibility and legal uncertainty, it is therefore to be concluded that the problem of legal uncertainty cannot be solved in the current situation – irrespective of whether the EC three-step test is included in national law.

What remains is the option to realise the advantage of Anglo-American fair-use conceptions: more flexibility in the field of copyright limitations. Admittedly, the current EC framework does not offer all features of classical fair-use systems. Sec. 107 of the US Copyright Act refers to use for purposes 'such as criticism, comment, news reporting, teaching [...], scholarship, or research.' The words 'such as' indicate that the expressly mentioned purposes merely serve as examples. Accordingly, US courts enjoy the freedom of identifying additional purposes and new forms of fair use.²³ The closed list of permissible limitations in Art. 5 of the Copyright Directive prevents national legislators in the EC from granting courts the same freedom. A flexible domestic concept of copyright limitations must necessarily keep within the limits of Art. 5. The EC catalogue of limitations, on the other hand, has gradually been broadened during the process of drafting and adopting the Copyright Directive.²⁴ The final version set out in the Directive comprises more than 20 permissible limitations. Against this background, an undue restriction of national fair-use systems need not be feared.

More importantly, the cases listed in Art. 5 reflect certain types of copyright limitations rather than delineating their conceptual contours precisely. Further concretisation is confidently left to national lawmakers. In this vein, the European Commission explicitly notes in its Green Paper 'Copyright in the Knowledge Economy' that

[t]he conditions of application of the exceptions are drafted in rather general language. Arguably, the approach chosen by the

21 See the requirement of foreseeability of the consequences of a given action, set forth by the European Court of Human Rights in the Sunday Times case, ECHR Judgement of April 26, 1979, Series A No. 30, para. 49. Cf. M.C. Janssens, 'Transparantie in het auteursrecht: een brug te ver?', *AMI* 2004, p. 205.

22 This solution has been chosen, for instance, in France. See Art. L. 122-5 of the French Intellectual Property Act (Code de la propriété intellectuelle). Cf. A. Lucas/P. Sirinelli, 'Chronique: Droit d'auteur et droits voisins', *Propriétés intellectuelles* 2006, p. 297 (314-316); V.L. Benabou, 'Patatras! A propos de la décision du Conseil constitutionnel du 27 juillet 2006, *Propriétés intellectuelles* 2006, p. 240; C. Geiger, 'The French Implementation of the Information Society Directive: a Disappointing Result of a Promising Debate', *AMI* 2008, p. 1. In the Netherlands, H. Cohen Jehoram advocates the inclusion of the three-step test in the Copyright Act. See 'Nu de gevolgen van trouw en ontrouw aan de Auteursrecht-richtlijn voor fair use, tijdelijke reproductie en dристappentoets', *AMI* 2005, p.

153, 'Wie is bang voor de driestappentoets in de Auteursrecht-richtlijn?', in: N.A.N.M. van Eijk/P.B. Hugenholtz (eds.), *Dommering-bundel*, Amsterdam: Otto Cramwinckel 2008, p. 57.

23 Cf. M.B. Nimmer/D. Nimmer, *Nimmer on Copyright*, LexisNexis: Matthew Bender & Company 2008, § 13.05[A][1][a], 13-155.

24 See M. Hart, 'The Proposed Directive for Copyright in the Information Society: Nice Rights, Shame about the Exceptions', *EIPR* 1998, p. 169; P.B. Hugenholtz, 'Why the Copyright Directive is Unimportant, and Possibly Invalid', *EIPR* 2000, p. 499; D.J.G. Visser, 'De beperkingen in de Auteursrecht-richtlijn', *AMI* 2001, p. 9; F. Bayreuther, 'Beschränkungen des Urheberrechts nach der neuen EU-Urheberrechtsrichtlinie', *Zeitschrift für Urheber- und Medienrecht* 2001, p. 828; J. Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', *GRUR Int.* 2001, p. 733.

drafters has left Member States a great deal of flexibility in implementing the exceptions contained in the Directive. Apart from the exception on transient copying, national legislation can be more restrictive than the Directive as to the scope of exceptions.²⁵

The Dutch legislator, however, may refrain from any further restrictions and implement literal copies of the prototypes listed in Art. 5 instead. To establish an open-ended, flexible framework, these literal copies only need to be combined with the abstract criteria of the three-step test.²⁶ In the aforementioned court decisions, the District Court of the Hague, for instance, could have arrived at the same conclusions on the basis of a general rule permitting unauthorised non-commercial private copying and the reproduction and communication to the public of current press articles on the condition that use falling within these categories does not cause a conflict with a work's normal exploitation, and does not unreasonably prejudice the legitimate interests of the right holder.

Enhanced flexibility

Lawmaking of this kind is capable of enhancing flexibility in the field of copyright limitations because it takes full advantage of the different functions of the three-step test. Instead of confining the test to an additional control mechanism and a straitjacket of copyright limitations, the test itself becomes part of a clause that offers breathing space for unauthorised use.²⁷ Within the flexible framework of its abstract criteria, the courts are free to identify privileged forms of use case-by-case. This 'enabling' function of the three-step test²⁸ can hardly be perceived as a novelty. By contrast, it constitutes a central element of the adaptation of copyright law to the digital environment that is clearly reflected in the Agreed Statement concerning the three-step tests of Art. 10 of the WIPO Copyright Treaty:

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in

their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

At the national level, the three-step test has been used in this enabling sense, for instance, in decisions of the German Federal Court of Justice. In a 1999 case concerning the Technical Information Library Hannover, the Court underlined the public interest in unhindered access to information. Accordingly, it offered support for the Library's practice of copying and dispatching scientific articles on request by single persons and industrial undertakings.²⁹ The legal basis of this practice was the statutory limitation for personal use in § 53 of the German Copyright Act. Under this provision, the authorised user need not necessarily produce the copy herself but is free to ask a third party to make the reproduction on her behalf. The Court admitted that the dispatch of copies came close to a publisher's activity.³⁰ Nonetheless, it refrained from putting an end to the library practice by assuming a conflict with a work's normal exploitation. Instead, the Court deduced an obligation to pay equitable remuneration from the three-step test, and enabled the continuation of the information service in this way.³¹

In a 2002 decision concerning the scanning and storing of press articles for internal e-mail communication in a private company, the Court gave a further example of its flexible approach to the three-step test. It held that digital press reviews had to be deemed permissible under § 49(1) of the German Copyright Act just like their analogue counterparts, if the digital version – in terms of its functioning and potential for use – essentially corresponded to traditional analogue products.³² To overcome the problem of an outdated wording of § 49(1) that seemed to indicate the limitation's confinement to press reviews on paper,³³ the Court stated that, in view of new technical developments, a copyright limitation may be interpreted extensively.³⁴ Taking these considerations as a starting point, the Court arrived at the conclusion that digital press reviews were

25 See Commission of the European Communities, Green Paper Copyright in the Knowledge Economy, document COM(2008) 466/3, chapter 2, p. 5.

26 For a more detailed explanation of this proposal, see M.R.F. Senftleben, 'Beperkingen à la carte: Waarom de Auteursrechtlijn ruimte laat voor fair use', AMI 2003, p. 10.

27 See M.R.F. Senftleben, 'L'application du triple test: vers un système de fair use européen?', *Propriétés intellectuelles* 2007, p. 453.

28 See M.R.F. Senftleben, 'Commentary on the WIPO Copyright Treaty', in: Th. Dreier/P.B. Hugenholtz (eds.), *Concise European Copyright Law*, New York: Kluwer Law International 2006, p. 108.

29 See Bundesgerichtshof, February 25, 1999, case no. I ZR 118/96, *Juristenzeitung* 1999, p. 1000, with case comment by H. Schack. For an English description of the case, see Senftleben, *supra* note 7, p. 206-208.

30 See Bundesgerichtshof, *ibid.*, p. 1004: 'Durch die Übersendung selbst hergestellter Vervielfältigungsstücke übt der Kopienversanddienst eine Funktion aus, die nicht nur die Tendenz in sich trägt, sich der Tätigkeit eines Verlegers

anzunähern, sondern die auch mit der Werkvermittlung durch Abrufdatenbanken verglichen werden kann.'

31 See Bundesgerichtshof, *ibid.*, p. 1005-1007. Cf. P. Baronikians, 'Kopienversand durch Bibliotheken – rechtliche Beurteilung und Vorschläge zur Regelung', *Zeitschrift für Urheber- und Medienrecht* 1999, p. 126. In the course of subsequent amendments to the Copyright Act, the German legislator modelled a new copyright limitation on the Court's decision. § 53a of the German Copyright Act even goes beyond the court decision by including the dispatch of digital copies in graphical format.

32 See Bundesgerichtshof, July 11, 2002, case no. I ZR 255/00, *GRUR* 2002, p. 963; *Juristenzeitung* 2003, p. 473, with case comment by Th. Dreier. Cf. Th. Hoeren, 'Pressespiegel und das Urheberrecht', *GRUR* 2002, p. 1022.

33 § 49(1) of the German Copyright Act, as in force at that time, referred to 'Informationsblätter'.

34 See Bundesgerichtshof, *ibid.*, p. 966-966.

permissible, if articles were included in graphical format without offering additional functions, such as a text collection and an index. This translation of the analogue press review exception into the digital environment, the Court maintained, was in line with the three-step test of Art. 5(5) of the Copyright Directive.³⁵

Need for change

In the current online environment, more flexibility in the field of copyright limitations may soon become a legislative necessity rather than a mere interpretative option. From an economic perspective, the web 2.0, with its interactive platforms and various forms of user-generated content, creates a parallel universe of traditional content providers relying on copyright protection, and emerging internet industries whose further development depends on robust copyright limitations. In particular, the newcomers in the online market – social networking platforms like Facebook, video forums like YouTube and virtual worlds like Second Life – promise a remarkable potential for economic growth that already attracted the attention of the OECD.³⁶ Against this background, the discussion on copyright's delicate balance enters a new stage. The defence of copyright limitations is no longer left to civil society groups and academic circles. Strong support can also be expected from online industries with new business models that depend on breathing space for unauthorised use rather than strong copyright protection.

In the current online environment, complex questions about the scope of copyright limitations arise particularly with regard to the distribution of markets.³⁷ In the relation between copyright or database owners and search engines, for instance, the right of quotation has become a crucial factor. The information displayed by search engines is virtually shaped and regulated by the scope of relevant national limitations. In the course of implementing the EC Copyright Directive, the Dutch legislator, for instance, decided to broaden the scope of the right of quotation. The long-standing 'context requirement' of Art. 15a of the Dutch Copyright Act, according to which quotations had to

serve the purpose of criticism and review, has been attenuated. In the amended version, the provision is also applicable to announcements and expressions serving comparable purposes. Accordingly, the quotation right has been held to cover information made available by search engines on the grounds that these engines 'announce' the contents of underlying source databases.³⁸ In a case concerning a search engine that collects information from the websites of housing agencies, the Court of Alkmaar clarified that for the quotation right to apply, the reproduction and communication of collected data to the public had to keep within the limits of what was necessary to give a good impression of the housing offer concerned.³⁹ The Court specified that, under this standard, it was permissible to provide search engine users with a description of up to 155 characters, address and rent details, and one single picture not exceeding the format of 194x145 pixels.⁴⁰

In Germany, the District Court of Hamburg, by contrast, refused to bring thumbnails of pictures displayed by Google's image search service under the umbrella of the right of quotation. Before turning to an analysis of copyright limitations, the Court clarified that a thumbnail did not have characteristic features of its own that made the individual features of the original work fade away. Accordingly, there was no room for qualifying the conversion of pictures into thumbnails as a 'free use' not falling under the exclusive rights of authors by virtue of § 24 of the German Copyright Act.⁴¹ On this basis, the Court argued with regard to copyright limitations that thumbnails could not be regarded as permissible quotations in the sense of § 51 no. 2 of the German Copyright Act because they did not serve as evidence or argumentative basis for independent comments.⁴² The stricter German quotation standard, still requiring use in the context of criticism and comment, thus prevented the Court from offering breathing space for the image-related search service in question. Interestingly, the Court expressly recognised that search engines were of

*essential importance for structuring the decentralised architecture of the world wide web, localising widely scattered contents and knowledge, and therefore, ultimately, for the functioning of a networked society.*⁴³

35 See Bundesgerichtshof, *ibid.*, p. 966-967.

36 See OECD, 'Participative Web: User-Created Content', document DSTI/ICCP/IE(2006)7/Final, dated April 12, 2007, online available at <http://213.253.134.43/oecd/pdfs/browseit/9307031E.PDF>.

37 Cf. Th. Dreier, 'Primär- und Folgemärkte', in: G. Schricker/Th. Dreier/A. Kur, *Geistiges Eigentum im Dienst der Innovation*, Baden-Baden: Nomos 2001, p. 51; C. Geiger, 'Die Schranken des Urheberrechts als Instrumente der Innovationsförderung – Freie Gedanken zur Ausschließlichkeit im Urheberrecht', *GRUR Int.* 2008, p. 459.

38 See Gerechtshof Arnhem, July 4, 2006, case no. 06/416, *IJN* AY0089, *Mediaforum* 2007, p. 21, with case comment by B. Beuving; *AMI* 2007, p. 93, with case comment by K.J. Koelman.

39 See Rechtbank Alkmaar, August 7, 2007, case no. 96206, *AMI* 2007, p. 148, with case comment by K.J. Koelman. On procedural grounds, the judgement has been annulled by Gerechtshof Amsterdam, December 13, 2007, case no. *IJN*

BC0125, online available at www.iept.nl.

40 See Rechtbank Alkmaar, *ibid.*, para. 4.14.

41 See Landgericht Hamburg, September 26, 2008, case no. 308 O 248/07, section II.B.4. The decision is online available at http://www.openjur.de/u/30461-308_o_248-07.html. Cf. Oberlandesgericht Jena, *GRUR-RR* 2008, p. 223 (224).

42 See Landgericht Hamburg, *ibid.*, section II.B.6.a. With regard to the right of quotation in German copyright law, see G. Schricker, in: G. Schricker (ed.), *Urheberrecht Kommentar*, 3rd edn., Munich: C.H. Beck 2006.

43 See Landgericht Hamburg, *ibid.*, section B.I.6.d.: 'Die Kammer erkennt nicht, dass Suchmaschinen, wie sie die Beklagte erfolgreich betreibt, von essentieller Bedeutung für die Strukturierung der dezentralen Architektur des World Wide Web, für das Lokalisieren von weit verstreuten Inhalten und Wissen und damit letztlich für die Funktionsfähigkeit einer vernetzten Gesellschaft sind.'

In spite of this 'esteem for search engine services', the Court did not feel in a position to embark on an extensive interpretation of copyright limitations that had been designed by the legislator with an eye to use under different circumstances. It was the task of the legislator, the Court maintained, to solve the tension between the strong public interest in efficient access to graphical online information and the economic interests of search engine providers on the one hand, and the interests of authors on the other.⁴⁴

The divergent views taken by Dutch and German courts show that the control over secondary online markets for value-added services, such as search engines, is an open question. The German example, moreover, testifies to the helplessness of continental-European courts in the face of a closed system of meticulously-defined limitations. Because of the complexity of the matter – both in terms of economic implications and user interests –, a simple black or white picture can hardly be drawn. Instead, a limitation infrastructure is needed that encourages a balanced, tailor-made solution case-by-case. In view of this need for a flexible application of copyright limitations, the current one-sided approach to the three-step test appears not only undesirable but also unwise and economically dangerous. A fair-use framework, by contrast, would offer adequate room to manoeuvre and the chance of gradually reconciling diverging interests and business models. To keep within the picture drawn above: it would provide sufficient shades of grey.

US decisions on search engines and image thumbnails, not surprisingly, give evidence of a more flexible framework. The Ninth Circuit Court of Appeals, for instance, held that the smaller, indexed images of Google's image search qualified as a fair use under the US fair-use doctrine. The Court grounded its analysis on the notion of transformative use that, traditionally, constitutes an important factor capable of tipping the scales to a finding of fair use.⁴⁵ Pointing out a significant benefit to the public, the Court noted that 'a search engine may be more transformative than a parody because a search engine provides an entirely new use for the original work, while a parody typically has the

same entertainment purpose as the original work.'⁴⁶ In this vein, the Court concluded that

*the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case. In reaching this conclusion, we note the importance of analyzing fair use flexibly in light of new circumstances.*⁴⁷

Conclusion

To allow new internet industries to develop, and take advantage of their economic potential, sufficient breathing space for copyright limitations is indispensable. The question of an appropriate balance between copyright protection and copyright limitations, therefore, is not unlikely to remain high on the agenda of policy makers and courts alike. Given these challenges, the time seems ripe to turn to a productive use of the three-step test. Instead of employing the test as a straitjacket of copyright limitations, modern copyright legislation should seek to encourage its use as a refined proportionality test⁴⁸ that allows both the restriction and the broadening of limitations in accordance with the individual circumstances of a given case. The adoption of a fair-use system that rests on the flexible, open criteria of a conflict with a normal exploitation and an unreasonable prejudice to legitimate interests would pave the way for this more flexible and balanced application of the test.⁴⁹

Ironically, this proposal recalls the origins of the abstract formula. At the 1967 Stockholm Conference for the Revision of the Berne Convention, the three-step test was perceived as a flexible framework, within which national legislators would enjoy the freedom of safeguarding national limitations and satisfying domestic social, cultural and economic needs.⁵⁰ What is proposed here, in other words, is a renaissance of this initial understanding of the three-step test – the renaissance of an approach to the international formula that would lead to a continental-European fair-use doctrine offering courts the opportunity to recalibrate the scope of copyright limitations case-by-case.

44 See Landgericht Hamburg, *ibid.*, section B.I.6.d.

45 Cf. P.N. Leval, 'Toward a Fair Use Standard', *Harvard Law Review* 103 (1990), p. 1105 (1111); N.W. Netanel, 'Copyright and a Democratic Civil Society', *Yale Law Journal* 106 (1996), p. 283 (381).

46 See US Court of Appeals for the Ninth Circuit, May 16, 2007, *Perfect 10, Inc. vs. Amazon.com*, Fd 3d., para. 11. With regard to parody and the notion of transformative use, see also the US Supreme Court decision *Campbell v. Acuff-Rose*, 510 US 569 (1994), II A: 'The central purpose of this investigation is to see [...] whether the new work merely supersedes the objects of the original creation [...] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in

other words, whether and to what extent the new work is "transformative".'

47 See US Court of Appeals, *ibid.*, para. 12.

48 See Senftleben, *supra* note 7, p. 125-133 and 243-244.

49 For guidelines concerning the appropriate interpretation of these criteria, see C. Geiger/J. Griffiths/R.M. Hilty, 'Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law', published elsewhere in this issue. The Declaration is a joint statement of experts that was prepared in meetings convened by the Max Planck Institute for Intellectual Property, Munich, and the School of Law at Queen Mary, University of London.

50 See Doc. S/1, *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*, Geneva: WIPO 1971, p. 81.